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No. 79-1326

In the Supreme Court of the United States

OCTOBER TERM, 1979

BARRETT HESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no written opinion. The court of appeals affirmed by unpublished order (Pet. App. A3-A5).

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979, and a petition for rehearing was denied on January 29, 1980. The petition for a writ of certiorari was filed on February 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by the district court's failure to comply strictly with Rule 30 of the Federal Rules of Criminal Procedure.

2. Whether the district court abused its discretion with respect to its handling of allegedly prejudicial publicity.

3. Whether petitioner was denied a fair trial because of alleged prosecutorial misconduct.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on three counts of willfully evading his federal income taxes for the years 1971, 1972, and 1973, in violation of 26 U.S.C. 7201 (Pet. App. A1). Petitioner, an attorney, was sentenced to concurrent terms of six months' imprisonment on each count (*id.* at A1-A2).

At trial, the government's evidence showed that petitioner had underreported his income for the years 1971, 1972, and 1973 by approximately $38,000, $54,000, and $226,000, respectively (26-Tr. 1989-1990).[1] Petitioner did not deny that he had substantially understated his income and taxes, but he claimed that the understatements were not willful because they were the fault of his accountant (see, *e.g.*, 1A-Tr. 8-11). The government introduced evidence, however, which demonstrated that petitioner had furnished his accountant with information that was misleading and incomplete (14-Tr. 1049-1050; 21-Tr. 1531-1539; 26-Tr. 1543-1572); that petitioner had

[1]The transcript volumes are designated as "1-Tr." through "39-Tr." and "Summation Tr." The separately bound record appendix filed with the court of appeals is designated "R."

conducted numerous financial transactions, which were unknown to his accountant, through bank accounts maintained under various names in various cities and countries (14-Tr. 1043-1062; 17-Tr. 1235 through 18-Tr. 1311; 21-Tr. 1576-1581); that petitioner had understated his income not only during the prosecution years but also for a number of previous years beginning in 1967 (R. A266-A267); that he had, during the prosecution years, filed bank financial statements which indicated that he then knew his income to be much greater than that which he was reporting (R. A267-A268); that he had demonstrated thorough knowledge and attention to detail in his financial dealings apart from his taxes (R. A273-A274); and that he had attempted, after the Internal Revenue Service investigation began, to shift responsibility to his accountant (21-Tr. 1583, 1595-1596; 22-Tr. 1636). At the conclusion of the trial, which lasted more than five weeks, the jury returned verdicts of guilty on all three counts (R. A159).

ARGUMENT

1. Petitioner first contends (Pet. 3-5) that he was denied a fair trial because the district court failed to comply strictly with Rule 30, Fed. R. Crim. P. Rule 30 provides, *inter alia*, that the trial court shall inform counsel of its rulings on requested jury instructions prior to closing arguments, and that counsel shall be given an opportunity to object to the court's charge outside the presence of the jury. In this case, neither the prosecution nor the defense requested a ruling on jury instructions prior to closing arguments, and the court made no such ruling. After the court had charged the jury, however, defense counsel requested a conference in chambers so that he could object to the charge that had been given.

The court declined to go into chambers, but it advised counsel that he could make a record of his objections by noting the numerical designation of any requested instruction which he believed not to have been covered in the court's charge (R. A149-A150). The court thereafter noted the objections as they were made, but declined to discuss their substance (R. A150-A155).

We acknowledge that the district court failed to comply with the letter of Rule 30. As the court of appeals properly concluded (Pet. App. A4), however, the court's error was harmless because petitioner was not prejudiced. If defense counsel had believed that the trial court's failure to rule on the jury instructions would hamper him in the preparation of his closing argument, he could have made a timely request for a ruling. His failure to do so constitutes powerful evidence that the trial court's failure to rule prior to closing arguments was inconsequential. Indeed, the district court's charge, as the court of appeals noted, was "fair and well balanced, especially on the key issue of willfulness" (*ibid.*), and petitioner has never alleged—much less shown—that the charge was deficient in any particular part. Moreover, in the context of this long, hotly-contested trial, in which the district court had often been abrupt with both counsel, it is "highly improbable" (*ibid.*) that the jury would have been influenced by the court's curtness in disposing of defense counsel's objections.

Petitioner's analysis (Pet. 3-5) of the Rule 30 case law does not support his contention that certiorari should be granted in this case. It is true that the courts of appeals seem to have taken differing views as to the appropriate standard of review in Rule 30 cases, with the Second Circuit normally requiring that the defendant establish

prejudice to secure reversal (*United States* v. *Lyles*, 593 F. 2d 182, 189 (2d Cir.), cert. denied, 440 U.S. 972 (1979)), while other circuits hold that reversal is appropriate unless it "affirmatively appears" in the record that the defendant was not prejudiced (*United States* v. *Schartner*, 426 F. 2d 470, 479 (3d Cir. 1970); *Lovely* v. *United States*, 169 F. 2d 386, 391 (4th Cir. 1948), cert. denied, 338 U.S. 834 (1949)). Whatever significance might normally be attributed to that difference in approach, it is irrelevant in the present case because the Second Circuit held that the record affirmatively demonstrated that "there was no prejudice" (Pet. App. A4). Accordingly, this case is not an appropriate vehicle for resolving any difference in approach that might exist among the circuits.[2]

2. Petitioner also contends that the district court failed to shield the jury from allegedly prejudicial publicity. That contention is without merit. It is well-established that decisions relating to extrajudicial publicity in a criminal trial are committed to the sound discretion of the

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[2]Petitioner also suggests that this Court should grant certiorari to establish an automatic reversal rule in cases where there has been imperfect compliance with Rule 30. This Court specifically rejected that invitation in *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974). Characterizing such a rule as "unduly mechanical," the Court suggested instead that the courts of appeals review the record to determine whether prejudice resulted (*ibid.*), which is what the Second Circuit did here. Petitioner's suggestion (Pet. 4) that the Tenth Circuit adopted an automatic reversal rule in *Hall* v. *United States*, 378 F. 2d 349 (1967), is doubtful. The court's opinion is itself inconclusive, and we have found no case in which that court has since considered the question. In any event, that standard was rejected in *Hamling*.

trial court. *Marshall* v. *United States*, 360 U.S. 310, 312 (1959); *United States* v. *Bowe*, 360 F. 2d 1, 11 (2d Cir.), cert. denied, 385 U.S. 961 (1966). In this case, the court of appeals reviewed the record and properly concluded (Pet. App. A4) that the district court did not abuse its discretion.

During the course of the trial, local newspapers published a number of articles reporting the evidence that had been introduced (Pet. App. A16-A23). While petitioner correctly asserts (Pet. 6) that the trial court did not grant every one of his requests for admonitions concerning those articles, the record clearly establishes that the trial court adequately protected petitioner's rights. At the outset, the district judge admonished the jurors that their verdict must be based solely on the evidence (R. A199); he instructed them, on two occasions thereafter, that they should not consider or discuss anything which came to them from the media or other extrajudicial sources (24-Tr. 1800; R. A288); and he specifically instructed them, as part of the charge, that they must ignore outside influences, including newspaper articles, in reaching their verdict (R. A147).

Petitioner's contention (Pet. 6) that the district court improperly limited *voir dire* with respect to potential pretrial publicity, by declining to undertake individual examinations of the veniremen, also lacks merit. Considerations of time and judicial resources frequently make it impossible to examine prospective jurors individually with respect to every allegation of potentially prejudicial publicity. See *United States* v. *Colabella*, 448 F. 2d 1299, 1304 (2d Cir. 1971), cert. denied, 405 U.S. 929 (1972). As the court of appeals concluded in this case, the district court fully protected petitioner's rights. The district court

identified the single venireman who had been exposed to the newspaper article and established, without revealing the contents of the article, that it would not affect his fairness and impartiality (Pet. App. A24-A25).[3] The court further determined that no one else had been exposed to the article (*id.* at A4).[4]

In short, petitioner has failed to show either that the district court abused its discretion in handling his protests concerning extrajudicial publicity or, indeed, that he was prejudiced in any way by the publicity.

3. Finally, petitioner contends (Pet. 7) that he was prejudiced by alleged prosecutorial misconduct. Petitioner isolates (*ibid.*; Pet. App. A29-A31) a number of government counsel's questions, comments, and arguments, and asserts that they show a pattern of conduct intended to prejudice the jury. It is well-settled, however, that a criminal conviction will be reversed only if it is clear, when the entire record is viewed as a whole, that the alleged misconduct was sufficient to deny the defendant a fair trial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940); *Berger* v. *United States*, 295 U.S. 78, 85 (1935); *United States* v. *White*, 486 F. 2d 204, 206-207 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974). Moreover, when the defense makes no timely objection to alleged misconduct, as was the case with

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[3]Although petitioner exercised his peremptory challenges, the record does not show whether he dismissed the potential juror who had been exposed to the article.

[4]Petitioner's suggestion (Pet. 6) that the district court "brandished" an article in front of the entire venire has no basis in the record. The court identified the article to which it was referring merely by specifying that the article had appeared in a particular newspaper on the previous day (Pet. App. A25).

many of the instances upon which petitioner now relies, a conviction will be reversed only if a failure to do so would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 239.

Petitioner was not denied a fair trial. As the court of appeals noted (Pet. App. A4), petitioner's trial was "long and complicated" and contained "overwhelming" evidence of guilt. In this context, it is unlikely that the jury could have been misled by either counsel's isolated remarks. *United States* v. *Sprayregen*, 577 F. 2d 173, 174-175 (2d Cir.), cert. denied, 439 U.S. 979 (1978); *Berger* v. *United States*, *supra*, 295 U.S. at 89. Moreover, many of government counsel's remarks were simply not improper. For example, petitioner asserts (Pet. 7) that government counsel improperly commented on the exercise of his right to remain silent. The record shows, however, that the questions upon which petitioner relies (15-Tr. 1074-1075) in making that assertion were legitimately asked for the purpose of showing that the government had not failed to follow any leads which petitioner might have provided concerning his tax liability. *Holland* v. *United States*, 348 U.S. 121 (1954). (See also R. A262, A274-A275; 5-Tr. 245-246.) Other alleged instances of misconduct reflect comments or questions that might well have been extraneous or poorly framed, but they do not reveal that type of prejudice necessary for reversal (see, *e.g.*, Summation Tr. 68-70, 72, 74, 77, 83, 85, 86, 107, 112, 118, 157, 188, 190).

In light of the record as a whole, the court of appeals properly concluded (Pet. App. A4) that petitioner's allegations of misconduct were insufficient to warrant reversal. That fact-bound claim requires no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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